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No. 27

In the Supreme Court of the United States

OCTOBER TERM, 1929

JOSEPH H. BROMLEY

v.

BLAKELY D. McCAUGHN, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the District Court is reported in 26 F. (2d) 380.

JURISDICTION

The case is here on the certificate of the Circuit Court of Appeals under Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS CERTIFIED

The questions presented by the certificate are these:

tion was assessed and collected are not unconstitutional and accordingly entered judgment for the defendant. The plaintiff appealed.

SUMMARY OF ARGUMENT

While general property taxes are direct taxes, taxes upon transfers of property are excises. The gift tax is imposed only upon the exercise of the right to make a gift. Use is distinguishable from ownership and it is settled that taxes upon the use are not direct taxes which must be apportioned. No question of retroactivity is involved. When dealing with the question of constitutionality, the presumption is in favor of the validity of the statute.

The due process clause of the Fifth Amendment is not a limitation upon the taxing power unless it is exercised in so arbitrary and capricious a manner as to amount to confiscation. The principle of graduated rates has been sustained uniformly, and they have a special justification in this Act since they are a counterpart of the estate-tax rates and the gift tax was imposed largely to prevent avoidance of the estate tax. It is also settled that reasonable exemptions are proper. There is nothing arbitrary in the exemptions and classifications in this Act.

ARGUMENT

I

THE TAX UPON TRANSFERS OF PROPERTY BY GIFT IS NOT A DIRECT TAX BUT AN EXCISE

This case presents the question left undecided in *Blodgett* v. *Holden*, 275 U. S. 142, and *Untermyer*

v. *Anderson*, 276 U. S. 440, namely, the validity of a tax upon gifts *inter vivos* as applied to transfers subsequent to the effective date of the Act. Aside from certain transfers in a total amount within the statutory exemption, the transfers in those cases were made prior to the effective date of the statute imposing the tax, and this Court held that as applied to such transactions, the tax was arbitrary and invalid under the due process clause of the Fifth Amendment.

In the instant case the transfers were made during 1925, after the effective date of the statute, June 2, 1924, and hence there is no question of retroactivity.

The answer to the first question certified requires a determination whether the statute imposes a direct tax which must be apportioned among the several States under Section 2, Clause 3, and Section 9, Clause 4, of Article I of the Constitution.

The fact that the gift tax is novel is not sufficient to render it unconstitutional and this is true despite the fact that the classification of taxes is largely historical. If gifts *inter vivos* offer a field for the imposition of a constitutional excise tax, the Act will not be declared invalid because of the belated exercise of congressional power.

The decisions of this Court afford no precise definition of a direct tax, but it was early settled that the term includes a capitation tax and a tax upon land. Prior to *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, it was thought that those were

the sole instances of the direct tax referred to in the Constitution. *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, 19. However, it has now become established that the constitutional rule of apportionment had its origin in the purpose to require that taxes on persons solely because of their general ownership of property should be levied upon the States in proportion to their population, and that there is no sound distinction between a tax levied on a person solely by reason of his general ownership of real property and the same tax imposed solely because of his general ownership of personal property. It is also settled that a tax on the income derived from either real or personal property is the legal equivalent of a direct tax on the property from which the income is derived. *Pollock* v. *Farmers' Loan & Trust Co., supra; Knowlton* v. *Moore,* 178 U. S. 41, 82.

However, the tax in this case is not a direct tax growing out of the general ownership of property, but is a tax upon a particular use of that property. It is not a tax directly upon the existence of the right to use the property but a tax upon the exercise of that right. That such a tax is an excise is indicated by the statement in *Knowlton* v. *Moore,* 178 U. S. 41, 88:

> Excises usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc.

That there is a substantial difference between the passive right and the active exercise of that right is

shown by the decisions of this Court in *Billings* v. *United States*, 232 U. S. 261, where a tax upon the exercise of the right to use a foreign-built yacht was sustained as an excise tax. Emphasizing the distinction between potential use and actual use, in *Pierce* v. *United States*, 232 U. S. 290, where a foreign-built yacht was out of commission during the entire taxable period, it was held that the owner was not liable for the tax.

An examination of the decisions of this Court shows that the following have been sustained as indirect taxes:

Taxes on particular types of sales, *Nicol* v. *Ames*, 173 U. S. 509; *Thomas* v. *United States*, 192 U. S. 363.

A tax upon the use of carriages for the conveyance of persons, *Hylton* v. *United States*, 3 Dall. 171.

A tax upon the amount of notes paid out by any State bank, *Veazie Bank* v. *Fenno*, 8 Wall. 533.

A tax upon manufactured tobacco having reference to its origin and intended use, *Patton* v. *Brady*, 184 U. S. 608.

A tax upon the manufacture and sale of colored oleomargarine, *McCray* v. *United States*, 195 U. S. 27.

A succession tax upon the devolution of title to real estate, *Scholey* v. *Rew*, 23 Wall. 331.

A tax on legacies, *Knowlton* v. *Moore*, 178 U. S. 41.

Taxes on doing business by particular methods, *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397; *Stratton's Independence* v. *Howbert*, 231 U. S. 399; *Doyle* v. *Mitchell Brothers Co.*, 247 U. S. 179; *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103.

In *Keeney* v. *New York*, 222 U. S. 525, the transfer of property in trust to be held during the grantor's lifetime with provision for its transfer after her death was treated as a transfer *inter vivos* and a State statute imposing a tax upon such transfer was held to be an excise rather than a property tax. In *Nichols* v. *Coolidge*, 274 U. S. 531, 541, this Court said:

> Certainly, Congress may lay an excise upon the transfer of property by death * * *.

We submit that a similar tax upon the transfer of property by gift *inter vivos* is likewise an excise.

Nor can it be doubted since *Knowlton* v. *Moore*, *supra*, and *New York Trust Co.* v. *Eisner*, 256 U. S. 345, that a tax may be indirect even though inevitable. Ability to shift the tax from the person upon whom it first falls is not a necessary element.

No decision of this Court classifies as direct a tax imposed on a particular use of property. In *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288, relied upon by the taxpayer, the basis of decision was (p. 294) that "the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of

the only uses of which it is capable, *i. e.*, consumption, sale or keeping for future consumption or sale," and that "the whole value of the whisky depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value." No transfer of the property by its owner nor any particular use thereof by him was the occasion for the tax.

A tax upon the transfer of property by gift is not equivalent to a tax upon property because of its ownership. It does not interfere with "the only uses of which it is capable." There are many useful things which one may do with his property besides giving it away.

From the above cited cases it appears that the use of property is distinguishable from the ownership of property and that indirect taxes may properly be based upon the use. This is illustrated by the opinion of this Court in *Nicol* v. *Ames*, 173 U. S. 509, where the validity of a tax upon the sale of commodities on boards of trade and exchanges was challenged on the ground that it was an unapportioned direct tax. With respect to this point, this Court said (pp. 518–519):

> It is asserted to be a direct tax, because it is a tax upon the sale of property measured by the value of the thing sold, and such a tax is a direct tax upon the property itself, and therefore subject to the rule of apportionment. Various cases are cited, from *Brown* v. *Maryland*, 12 Wheat. 419, down to those

involving the validity of the income tax, 157 U. S. 429; 158 U. S. 601, for the purpose of proving the correctness of this proposition. All the cases involved the question whether the taxes to which objection was taken amounted practically to a tax on the property. If this tax is not on the property or on the sale thereof, then these cases do not apply.

We think the tax is in effect a duty or excise laid upon the privilege, opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act. It is not a tax upon the business itself which is so transacted, but it is a duty upon the facilities made use of and actually employed in the transaction of the business, and separate and apart from the business itself. It is not a tax upon the members of the exchange nor upon membership therein, nor is it a tax upon sales generally. The act limits the tax to sales at any exchange, or board of trade, or other similar place, and its fair meaning is to impose a duty upon those privileges or facilities which are there found and made use of in the sale at such place of any product or merchandise. Whether this facility or privilege is such a thing as can be legally taxed, while leaving untaxed all other sales made outside of such places, will be discussed further on. At present it is enough to say that the tax is not upon the property sold, and cannot on that ground be found to be direct.

Again, in *Billings* v. *United States, supra* (pp. 280–281), the Court said:

> It is to be observed that the provision deals with ownership and distinguishes between ownership and use, since it bases the tax not upon the former but upon the latter. From this it follows that it is not ownership but the election during the taxing period of the owner to take advantage of one of the elements which are involved in ownership, the right to use which is the subject upon which the statute places the excise duty. In this view the fact of use, not its extent or its frequency, becomes the test, as distinguished from mere ownership, for that in the statutory sense could exist without use having taken place. The words of the statute under this construction were used in an every-day sense and not in a technical one: in other words but convey the distinction without reference to nice analysis of the nature of things which is commonly conceived to exist between ownership and use. Let it be conceded that the ownership of property includes the right to use, plainly we think, as use and ownership are distinguished one from the other in the provision, the word "use" as there employed means more than the mere privilege of using which the owner enjoys, and relates to its primary signification, as defined by Webster; "The act of employing anything or of applying it to one's service; the state of being so employed or applied." If the use which arises from the fact of ownership without more was what the

statute proposed, then it is inconceivable why the difference between use and ownership was marked in the provision and made the basis of the tax which it imposed. While this construction in this case leads to the same conclusion as does that which the court below affixed to the statute, that is, that it taxed the privilege of use, or, in other words the potentiality of using involved in ownership, inherently there is this fundamental difference between the interpretation we give and that which the lower court adopted, since the privilege of use is purely passive (or subjective), a right which necessarily pertains to ownership and must exist where there is ownership, as one may not obtain ownership without acquiring the privileges of use which ownership gives. The other, on the contrary, that is, use in the statutory sense, although it arises from ownership, is active (objective), that is, it is the outward and distinct exercise of a right which ownership confers but which would not necessarily be exerted by the mere fact of ownership.

This Court again distinguished between ownership and use in *Bowman* v. *Continental Oil Co.*, 256 U. S. 642. In that case the constitutionality of a State statute imposing a tax upon gasoline sold or used was challenged because it was a property tax and not levied in compliance with the requirements of the State constitution. But this Court held that the tax was in fact an excise and not a property tax.

After full consideration of the above cases the gift tax has been sustained by the District Court for the Western District of Michigan, *Blodgett* v. *Holden,* 11 F. (2d) 180, and the Circuit Court of Appeals for the Second Circuit, *Anderson* v. *McNeir,* 16 F. (2d) 970. Since this Court held the statute invalid as it was retroactively applied in *Blodgett* v. *Holden,* 275 U. S. 142, it was found unnecessary to answer the certified question dealing with the classification of the tax as direct or indirect. After the decision in that case, *Anderson* v. *McNeir,* was reversed in this Court on confession of error, 275 U. S. 577, with the result that the classification of the tax has not yet been considered by this Court. The question is now pending in another case upon a writ of certiorari from the decision of the Circuit Court of Appeals for the Second Circuit upholding the tax, *O'Connor* v. *Anderson,* 28 F. (2d) 873 (No. 33, October Term, 1929), in which a stipulation has been filed that it shall abide the decision of this Court in the instant case.

An analysis of the practical nature and actual results of the tax in the case at bar (see *Nicol* v. *Ames,* 173 U. S. 509, 515) demonstrates that it is not the ownership of property which is taxed but the election of the owner to take advantage of one of the elements which are involved in ownership, the right to make a gift. The tax is laid upon the exercise of that right and is comparable to the tax upon the exercise of the right to use the yacht in

the *Billings case* and the tax upon the exercise of the right to sell gasoline in the *Bowman case*. Neither the property nor any of the incidents of ownership are taxed in the hands of either the donor or the donee. The gift tax is imposed only after the actual transfer, at which time the title and ownership of the donor have ceased by reason of the gift. Hence the tax does not fall upon the donor until after the termination of his ownership and we submit that it is plainly an excise tax upon the exercise of the right, and not a direct tax which is required to be apportioned.

The only distinction between a gift and a devise is that the latter is a statutory, not a common-law privilege; but this could hardly be sufficient to invalidate a tax upon the former at the same time that the validity of a tax upon the latter is recognized. Among the cases cited above are some upholding the right to tax the exercise of the privilege of sale which, like the privilege of disposing of property by gift, is a natural right. It is difficult to formulate a reason why a tax upon the exercise of the right to make a sale of property differs in principle from a tax upon the exercise of the right to make a gift of property. Our contention that there is no difference is supported by the following excerpt from the dissenting opinion of Mr. Justice Holmes, concurred in by Mr. Justice Brandeis and Mr. Justice Stone in *Untermyer* v. *Anderson*, 276 U. S. 440, 446:

> I do not imagine that the authority of Congress to tax the exercise of the legal power to make a gift will be doubted any more than its authority to tax a sale.

The gift tax imposed by the Revenue Act of 1924 introduced a new type of Federal taxation. It was appended to the estate-tax provisions to supplement that tax and to make it effective. The estate tax and the gift tax are in *pari materia* and progressively in execution of the power to raise revenue. This is not to use the power of taxation for an ulterior purpose, as in the *Child Labor Tax Case,* 259 U. S. 20. There can be no doubt that the gift tax was enacted by Congress as a means of making the estate tax effective. By splitting up large fortunes and making absolute gifts *inter vivos,* the estate tax was being avoided (65 Cong. Rec., Pt. 3, pp. 3119, 3120; Pt. 4, pp. 3170, 3172; Pt. 8, pp. 8094, 8097). Adequate provision was made for crediting the gift tax against the estate tax where the amount of the gift is later required to be included in a decedent's gross estate. (Sec. 322, Rev. Act 1924, and Sec. 404, Rev. Act 1928.)

The presumption in this case, of course, is in favor of the validity of the statute. And this presumption, repeatedly indulged, is particularly strong when considering a Revenue Act. *Nicol* v. *Ames,* 173 U. S. 509. As shown above, this statute is an integral part of an entire taxing scheme considered necessary by Congress for satisfying the

needs of the Government for revenue. This Court has often recognized that a measure may be valid as a necessary adjunct to something which clearly lies within the legislative power, even though, standing alone, its constitutionality might have been subject to doubt. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, *Ruppert* v. *Caffey*, 251 U. S. 264, *Everard's Breweries* v. *Day*, 265 U. S. 545, *Taft* v. *Bowers*, 278 U. S. 470.

II

PROGRESSIVE RATES OF TAXATION AND PROPER EXEMPTIONS VIOLATE NO CONSTITUTIONAL PROVISIONS APPLICABLE TO FEDERAL TAXATION

In the second question the Circuit Court of Appeals seeks the guidance of this Court with respect to whether the fact that the statute imposes a tax which is graduated and subject to exemptions makes it (a) repugnant to the first clause of Section 8 of Article I of the Constitution requiring uniformity of duties, imposts and excises throughout the United States; or (b) violative of the Fifth Amendment to the Constitution forbidding the depriving of any person of his property without due process of law.

In *Knowlton* v. *Moore*, 178 U. S. 41, 92, the provisions of the War Revenue Act of 1898, c. 448, 30 Stat. 448, which imposed a tax upon legacies, were challenged upon similar grounds. It was demonstrated conclusively that from the very first Congress the practice under the Constitution had disregarded the rule of inherent uniformity, that is,

intrinsically equal and uniform taxes, but it was shown that the principle of geographical uniformity had been consistently enforced. A review of Congressional legislation (p. 98 *et seq.*) exhibited the fact that from the foundation of the Government taxes have been imposed in proportion to ability to bear the burden and the objection to the progressive rate feature of the statute was held to be without merit.

The progressive feature of the income-tax provisions of the Tariff Act of October 3, 1913, c. 16, 38 Stat. 166, was likewise challenged in *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1. Upon the authority of *Knowlton* v. *Moore, supra,* it was held (p. 25) that there was an absolute want of foundation for the contention and that it was necessarily foreclosed by the earlier ruling. The objection that the tax was in violation of the Fifth Amendment was held to be without basis (p. 24) "since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause. *Treat* v. *White,* 181 U. S. 264; *Patton* v. *Brady,* 184 U. S. 608; *McCray* v. *United States,* 195 U. S. 27, 61; *Flint* v. *Stone Tracy Co., supra; Billings* v. *United States,* 232 U. S. 261, 282. * * *" See also *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103, 111; *Tyee Realty Co.* v. *Anderson,* 240 U. S. 115; *Billings*

v. *United States,* 232 U. S. 261, 282; *Flint* v. *Stone-Tracy Co.,* 220 U. S. 107, 173; *High* v. *Coyne,* 178 U. S. 111.

The cases cited above definitely settle the principle that the uniformity required by the Constitution has reference merely to geographical uniformity and that the due process clause of the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress, unless it is exercised in so arbitrary and capricious a manner as to amount to confiscation, as in *Nichols* v. *Coolidge, supra.* The amount of the tax must be determined by some standard and this Court has already said that to require the same amount to be paid on all transfers is not so fair as to impose the burden in proportion to the value of the property. *Keeney* v. *New York,* 222 U. S. 525, 534.

The power of Congress in levying taxes is very wide and where a classification is made of taxpayers that is reasonable and not merely arbitrary and capricious, the Fifth Amendment can not apply. *Barclay & Co.* v. *Edwards;* 267 U. S. 442, 450.

Schlesinger v. *Wisconsin,* 270 U. S. 230, 240, does not support the contention that a graduated tax is invalid. That case, as well as the others cited in support of the contention that the tax is not uniform, dealt with the equal protection clause of the Fourteenth Amendment. The Fifth Amendment, as this Court has so often said, has no equal protection clause, and cases dealing with restrictions upon the States are not in point when considering Fed-

eral taxes. Thus in *LaBelle Iron Works* v. *United States,* 256 U. S. 377, 392, it was said:

> Reference is made to cases decided under the equal protection clause of the Fourteenth Amendment (*Southern Ry. Co.* v. *Greene,* 216 U. S. 400, 418; *Gast Realty Co.* v. *Schneider Granite Co.,* 240 U. S. 55); but clearly they are not in point. The Fifth Amendment has no equal protection clause; and the only rule of uniformity prescribed with respect to duties, imposts, and excises laid by Congress is the territorial uniformity required by Art. I, § 8. *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, 557; *Knowlton* v. *Moore,* 178 U. S. 41, 98, 106; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 150; *Billings* v. *United States,* 232 U. S. 261, 2[illegible]. *Brushaber* v. *Union Pacific R. R. Co.,* [illegible]0 U. S. 1, 24. That the statute under consideration operates with territorial uniformity is obvious and not questioned.
>
> Appellant cites *Looney* v. *Crane Co.,* 245 U. S. 178, 188, and *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, 145, but these cases also are inapplicable, being based upon the due process clause of the Fourteenth Amendment, with which state taxing laws were held in conflict because they had the effect of imposing taxes on the property of foreign corporations located and used beyond the jurisdiction of the taxing State. There is no such infirmity here.

Moreover, the cited language from the *Schlesinger* opinion had reference to the Wisconsin statute

imposing inheritance taxes, providing that gifts made in contemplation of death should be included in the taxable estate, and making a conclusive presumption that gifts within six years of death had been so made. That case is only authority for the proposition that graduated *inheritance* taxes could not properly be laid upon a gift unless it was testamentary in character, and that the tax could not be upheld as an excise on gifts *inter vivos* because it reached only those made within six years of death and exempted all others, which would be wholly arbitrary.

This Court has already sustained the principle of graduated rates upon legacies, *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 299; *Knowlton* v. *Moore, supra;* and upon income, *Brushaber* v. *Union Pac. R. R., supra; Burk-Waggoner Oil Association* v. *Hopkins,* 269 U. S. 110; *Tyee Realty Co.* v. *Anderson,* 240 U. S. 115. This Court has said "That which is settled beyond dispute may not be disregarded and be brought into the realm of that which is controvertible and questionable by the mere garb in which propositions are clothed." *Billings* v. *United States,* 232 U. S. 261, 284.

Furthermore, the graduated rates have a special justification in this Act. The gift tax was imposed largely to prevent avoidance of the estate tax by gifts *inter vivos* and accordingly it was necessary to adjust the rates upon gifts to equalize the rates upon estates. This Congress has done. Compare Sections 301 and 319 of the Revenue Act of 1924.

The avoidance of the estate tax could not be adequately prevented unless the gift tax provisions contained the same graduated rates. Congress was no more powerless to graduate the rates than it was to impose the tax itself.

Accordingly we submit that, unlike *Nichols* v. *Coolidge, supra,* there is no arbitrary classification shown here and hence no violation of the Constitution. In the absence of constitutional limitations, the question whether a progressive tax is more just and equal than a proportional one is a legislative, not a judicial, question. *Knowlton* v. *Moore,* 178 U. S. 41, 109.

The contention that because the statute is subject to exemptions it is repugnant to the Constitution is also not open, since a similar contention was expressly considered and adversely disposed of in *Knowlton* v. *Moore, Flint* v. *Stone Tracy Co.,* and *Brushaber* v. *Union Pac. R. R., supra,* upon the broad ground that differences in fact between various subjects of taxation will support different treatment in the taxing statutes and presents no question under the Fifth Amendment. This Court has further declared that "when there is a difference it need not be great or conspicuous in order to warrant classification." *Keeney* v. *New York,* 222 U. S. 525, 536.

The decision of this Court in *United States* v. *Goelet,* 232 U. S. 293, makes it clear that there is a difference in fact between resident and nonresident

citizens, and the difference is so substantial that this Court held a tax levied upon "any citizen" can not be treated, without the expression of a more definite intent, as embracing the exceptional exertion of the power to tax one permanently residing abroad.

This Court has declared that objections to a tax because of the exemptions made therein are, in substance and effect, but an assertion that the tax is void because of want of intrinsic uniformity—an assertion which has been adversely disposed of in repeated decisions. *Billings* v. *United States,* 232 U. S. 261, 283–284.

The exemption of individual gifts which do not exceed $500 is said to be an arbitrary discrimination. This contention is likewise without merit since it must be obvious that the amount of tax to be realized from such transfers would be disproportionate to the cost of collection. The District Court took this view and held the fixing of a minimum valuation was reasonable.

We submit that neither the graduated rates nor the statutory exemptions render the tax invalid.

CONCLUSION

The decisions of this Court furnish many precedents justifying the classification of this tax as an excise. No new question is presented by the provisions for graduated rates and reasonable exemptions and it is settled that they do not offend against the Constitution. Accordingly it is submitted that

the answer to both questions certified should be in the negative.

Respectfully submitted.

CHARLES E. HUGHES, Jr.,
Solicitor General.

SEWALL KEY,
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APPENDIX

Article I of the Constitution provides as follows:

"SECTION. 2. * * *

"Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

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"SECTION. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; * * *

"SECTION. 9. * * *

"No Capitation, or other direct, tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

The Fifth Amendment to the Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for

the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sections 319–324 and 1103 of the Revenue Act of 1924, Act of June 2, 1924, c. 234, 43 Stat. 253, 313–316, 353 (U. S. C., Title 26, Secs. 1131–1136, 1271) provide:

"SEC. 319. For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a nonresident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly: (Here follow the rates of tax.)

"SEC. 320. If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

"SEC. 321. In computing the amount of the gifts subject to the tax imposed by section 319, there shall be allowed as deductions:

"(a) In the case of a resident—

"(1) An exemption of $50,000;

"(2) The amount of all gifts or contributions made within the calendar year to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees, or fraternal society, order, or association, operating under the lodge system, but only if such gifts or contributions are to be used by such trustee or trustees or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year by such corporation, trustee, or fraternal society, order, or association for a religious, charitable, scientific, literary, or educational purpose, or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year to the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act;

"(3) Gifts the aggregate amount of which to any one person does not exceed $500;

"(4) An amount equal to the value of any property transferred by gift within the calendar year, which can be identified (A) as having been received by the donor within five years prior to the time of his making such gift, either from another person by

gift or from a decedent by gift, bequest, devise, or inheritance, or (B) as having been acquired in exchange for property so received. This deduction shall be allowed only where a gift tax or an estate tax under this or any prior act of Congress was paid by or on behalf of the donor or the estate of such decedent, as the case may be, and only in the amount of the value placed by the Commissioner on such property in determining the value of the gift or the gross estate of such decedent, and only to the extent that the value of such property is included in the total amount of gifts made within the calendar year and not deducted under paragraph (2) or (3) of this subdivision.

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"SEC. 322. In case a tax has been imposed under section 319 upon any gift, and thereafter upon the death of the donor the amount thereof is required by any provision of Part I of this title to be included in the gross estate of the decedent then there shall be credited against and applied in reduction of the estate tax, which would otherwise be chargeable against the estate of the decedent under the provisions of section 301, an amount equal to the tax paid with respect to such gift; and in the event the donor has in any year paid the tax imposed by section 319 with respect to a gift or gifts which upon the death of the donor must be included in his gross estate and a gift or gifts not required to be so included, then the amount of the tax which shall be deemed to have been paid with respect to the gift or gifts required to be so included shall be that proportion of the entire tax paid on account of all such gifts which the amount of the gift or gifts required to be so included bears to the total amount of gifts in that year.

"SEC. 323. Any person who within the year 1924 or any calendar year thereafter makes any gift or gifts in excess of the deductions allowed by section 321 shall, on or before the 15th day of March, file with the collector a return under oath in duplicate, listing and setting forth therein all gifts and contributions made by him during such calendar year (other than the gifts specified in paragraph (3) of subdivision (a) and in paragraph (2) of subdivision (b) of section 321), and the fair market value thereof when made, and also all sales and exchanges of property owned by him made within such year for less than a fair consideration in money or money's worth, stating therein the fair market value of the property so sold or exchanged and that of the consideration received by him, both as of the date of such sale or exchange.

"SEC. 324. The tax imposed by section 319 shall be paid by the donor on or before the 15th day of March, and shall be assessed, collected, and paid in the same manner and subject, in so far as applicable, to the same provisions of law as the tax imposed by section 301.

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"SEC. 1103. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby."

By Section 324 of the Revenue Act of February 26, 1926, c. 27, 44 Stat. 9, Section 319 of the Revenue Act of 1924 was amended merely in respect to the rate of the tax with the further provision that that section should take effect as of June 2, 1924.

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